United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-2075

To be argued by
HENRY J. STEINGLASS

United States Court of Appeals

For the Second Circuit

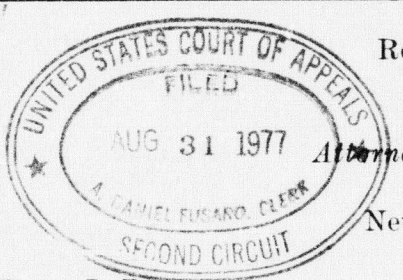
ALBERT VICTORY,
Petitioner-Appellee,

against

ROY BOMBARD, as Superintendent of Greenhaven Correctional Facility,
Respondent-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLANT



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Question Presented

Under New York law, a defendant may not be convicted of felony murder unless he was committing the underlying felony at the time the killing occurred. On this appeal, the question presented is whether the jury instructions on this simple legal concept were constitutionally inadequate even though the point was covered numerous times by the trial judge and was emphasized throughout the trial by the prosecutor and defense counsel.

Statement of the Case

Preliminary Statement

The State of New York appeals from an order, entered May 31, 1977, in the Southern District of New York (Ward, J.), granting a petition for a writ of habeas corpus by petitioner-appellee Albert Victory, a state prisoner. The State was directed to re-try the petitioner within ninety days of the final determination of this matter or else release him from custody.

Albert Victory was convicted in New York State Supreme Court, after trial by jury, of the felony murder of a New York City police officer, committed on October 7, 1968. Victory is presently serving a sentence of twenty-five years to life imprisonment, imposed on May 26, 1970. The judgment of conviction was unanimously affirmed by the Appellate Division, First Department, 38 A.D. 2d 689 (1971) (without opinion) and by the New York Court of Appeals in a decision reported at 33 N.Y. 2d 75 (1973). Certiorari was denied by the United States Supreme Court. 416 U.S. 905 (1974). A motion for reargument in the New York Court of Appeals was denied (1976).

The District Court vacated this conviction on the ground that the jury instructions did not adequately inform the jury that it could convict Victory of felony murder only if he was escaping from the police officer at the time the officer was shot.

The Crime

John Vareeha, a 25-year-old uniformed patrolman, stopped two men in front of a discotheque named Arthur's

on October 7, 1968, having observed their car speeding through the streets of midtown Manhattan and running red lights. The driver of the car was Albert Victory, whose driver's license had been revoked three years earlier. Victory's companion, Robert Bornholdt, was carrying a fully loaded automatic pistol.

When Patrolman Varecha asked to see a license and registration, Victory claimed that he and Bornholdt had not been in the car, and the two men started to enter the discotheque. The officer barred their way. Victory then responded physically, grabbing Patrolman Varecha.

The officer then told Victory that he was under arrest. Instead of submitting to the arrest, however, Victory kneed the officer in the groin. Bornholdt jumped on the officer's back, and both men repeatedly struck the officer. Patrolman Varecha, doubled over in pain, managed to ward off the two men with his nightstick, and to draw his gun. He told the two men they were under arrest.

Victory and Bornholdt, however, attempted to frustrate the arrest, maneuvering to keep apart so that the injured officer could not focus his attention on both men at the same time. Victory backed off into a nearby alley, despite the officer's orders not to do so. Then, as Bornholdt approached Patrolman Varecha from the rear, Victory, now in close proximity to the officer, started fighting with the officer.

Both Victory and Bornholdt repeatedly ordered a witness, who had come to the assistance of the police officer, to leave the alley. Then, as Victory scuffled with Patrolman

Varecha, Bornholdt shot the officer at close range with his automatic pistol. Leaving the wounded officer staggering in the alley, Bornholdt and Victory ran from the scene. They were apprehended a few blocks away, Bornholdt still in possession of the pistol. Patrolman Varecha died en route to Bellevue Hospital.

The Trial

Victory and Bornholdt were tried on charges of felony murder. Ind. No. 4894-1968 (5A).* Bornholdt was also tried for intentional murder. Ind. No. 4896-1968 (16A).

On the felony murder charge, the underlying felony was Escape in the Second Degree (N.Y. Penal Law Sec. 205.10), one of the nine serious and violent "predicate felonies" under New York law (Penal Law Sec. 125.25(3)). The crime of Escape in the Second Degree is committed when a person escapes from custody after being arrested for a felony, in this case an assault upon a police officer.** Felony assault itself is not one of the "predicate felonies" for felony murder under New York law.

At the trial, there was no dispute that Bornholdt shot and killed the officer, that Victory was present at the time, and that both men ran from the scene after the shooting. The principal issue with respect to Victory was whether he

* Unless otherwise noted, numbers in parentheses refer to pages of the nine-volume printed record on appeal filed in the state courts, which was submitted to the District Court. Numbers followed by the letter "A" are to the preliminary papers contained in the first volume of the record. Numbers preceded by "VD" refer to pages of the minutes of jury selection contained in volumes 1 through 4.

** The statutory provisions referred to are reproduced in the Addendum hereto.

was participating with Bornholdt in an attempt to escape at the time Patrolman Varecha was shot. The timing of Victory's efforts to escape was a matter of great importance. If Victory was attempting to escape with Bornholdt at the time the officer was shot, then he could be found guilty with Bornholdt of murder under the felony murder doctrine, which holds all participants in one of the "predicate felonies" responsible for a killing committed in the course of and in furtherance of the felony. But, if Victory did not start to escape until after the shooting, then, while he might have committed the crime of Escape in the Second Degree after the shooting, he was not participating in one of the predicate felonies at the time the officer was killed, and only Bornholdt, who had presented a defense of insanity, could be convicted of murder.

Accordingly, Victory's conduct prior to the shooting became a subject of extensive testimony and argument at the trial. Numerous factual details were developed and discussed. The legal concept, however, that felony murder required a determination of the timing of the underlying felony in relation to the shooting, was a simple one: Victory could not be convicted of felony murder unless his escape was in progress at the time the officer was shot. That simple legal concept of timing was repeated to the jury throughout the trial.

Jury Selection

During the lengthy process of selecting the jury, which began on March 2, 1970, the jurors were informed on numerous occasions that the felony murder charge against Victory was based upon his participation in the underlying

felony of Escape in the Second Degree at the time that Patrolman Varecha was shot. Each new panel of prospective jurors heard the indictment read, informing them of the felony murder charge (VD 336-337, 929, 1345-1346, 1474-1475, 1819, 2052). The indictment charged Victory and Bornholdt with felony murder in that

> while engaged in the commission of the crime of Escape in the Second Degree and in the course of such crime and in the furtherance thereof and in immediate flight therefrom, the defendants caused the death of Patrolman John Varecha, not a participant in the crime, by shooting him with a pistol. Indictment No. 4894/68 (5A).

Moreover, in questioning prospective jurors, Victory's counsel gave numerous lengthy explanations of the felony murder indictment. He made it clear that the jury could not convict Victory of felony murder unless he was in the process of escaping at the time Patrolman Varecha was shot:

> the police officer was a young, rookie cop who the People claim was shot by the defendant Bornholdt *during the course of a felony.* There are two indictments in this case. One indictment charges the defendant Bornholdt with murder; the second indictment charges the defendant Bornholdt and Victory with murder on the theory of felony murder. . . . The circumstances in this case as they will develop, as the People will submit it to you in an opening statement, indicate that the defendant Albert Victory and the defendant Bornholdt were stopped for a traffic infraction, and thereafter *a scuffle occurred, followed by, the People claim, an escape in the second degree, followed by a—or simultaneous with, the People may claim simultaneous with*

the shooting of a police officer by the defendant Bornholdt. Now, the reason why the defendant Victory is here is because the grand jury has returned an *indictment charging that he participated in the crime of escape in the second degree, the underlying felony* in the felony murder that the People are claiming (VD 542-543) (Italics added).

The District Attorney is going to read to you a consolidated indictment which contains two counts. One of those counts refers only to the defendant Bornholdt, and that particular count charges the defendant Bornholdt with the crime of murder. The other count that will be recited to you charges the defendant Bornholdt and Victory with the crime of felony-murder, that is, the commission of a murder *during the course of an underlying felony. In this case that felony is escape in the second degree.* And you have heard me talk about the traffic tickets and the scuffle and this escape in the second degree business (VD 590-591) (Italics added).

I'm not suggesting to you that this did not happen. There was a shooting of a police officer. Whether it is murder as defined by the New York Penal Code is something that you will have to decide, but there is no question but that there was a shooting. The People claim that Robert Bornholdt shot a uniformed police officer, and we certainly are not denying that that took place. *The question that you are going to have to decide* after listening to these witnesses *will be whether or not*, on the basis of all of the evidence, *there is participation in an underlying felony, the underlying felony of escape in the second degree on the part of the defendant Victory* (VD 729-730) (Italics added).

The co-defendant in this case, Bornholdt, who has been indicted and is part of a consolidated indictment, named with the defendant Victory, has been characterized as the trigger man. I explained briefly yesterday

that *the theory behind the case against the defendant Victory is that he participated in the underlying felony of escape in the second degree, and by reason of his participation, he is charged with the crime of murder.*

[Assistant District Attorney] KEENAN: *And by reason of the fact that his accomplice shot and killed a police officer.* That is the reason that he is charged, and I object to the question as worded.

MR. POLLINA [Victory's attorney]: All right.

* * *

But as it stand now, *Mr. Victory is participant in an underlying escape; and during the period of escaping,* the prosecution contends that *at that time the deceased* in this case, this rookie cop, *was shot* by the co-defendant Bornholdt (VD 845-846) (italics added).

The first count charges that the defendants Albert Victory and Robert Bornholdt with the crime of felony murder, and in effect what it says is that *during the commission of a felony,* a homicide, *a shooting took place,* and this shooting resulted in the death of a police officer.

Now the People allege that the shooting was done by the defendant Bornholdt. Defendant Bornholdt shot a police officer. *It is claimed by the People that the underlying felony in this case is escape in the second degree; that the defendant Bornholdt and the defendant Victory were attempting to escape, and during the course of this escape this police officer was shot,* and by reason of those facts the felony murder indictment is returned. The second count involves only the defendant Bornholdt, and in that case the defendant Bornholdt is charged separately with common-law murder.

* * *

it all began when the defendants Victory and Bornholdt were stopped because of a traffic infraction, a simple

traffic infraction. Thereafter the People claim that a scuffle between the defendants and the police officer, or both of them, or one of them—this is something that the evidence may develop, ensued, and thereafter *there was an attempt to escape from the police officer. The People claim—and as a result of this alleged attempt to escape the police officer was shot by Bornholdt* (VD 988-990) (Italics added).

Albert Victory, is charged with a felony murder. The People contend that *during the commission of a felony, in particular, escape in the second degree, the defendant Bornholdt shot and killed a police officer, and that they were acting in concert in an attempt to escape. The burden on the part of the People is to establish this beyond a reasonable doubt.* Now, evidence will be offered by the People in an effort to establish that this is what occurred; that, in fact, the defendant Albert Victory was *intending to escape* (VD 1066) (Italics added).

both of these defendants were initially stopped by this patrolman as a result of a traffic infraction, and thereafter a skirmish ensued in which the People claim there was an assault, followed by *an attempted escape, during which time it is alleged that the defendant Bornholdt shot and killed the police officer.* There is no claim that the shooting was done directly by the defendant Albert Victory. The claim is that the defendant Bornholdt shot the police officer, and *the culpability of the defendant Victory rests upon his allegedly having participated in the underlying felony of escape while this shooting took place.* And this is something that the People must establish beyond a reasonable doubt (VD 1521) (Italics added).

The first count charges the defendant Albert Victory, jointly with the crime of felony murder and in that indictment the District Attorney alleges that the de-

> fendant Robert Bornholdt shot and killed a police officer *while in the commission of the underlying crime of escaping from this police officer.* Now, if at the conclusion of this trial his Honor were to charge you that in order to return a verdict of guilty as against my client, Albert Victory you must, in your own mind, after hearing all of the evidence, find *beyond a reasonable doubt that my client was in the act of escaping at the time that the police officer was killed* (VD 1946-1947) (Italics added).

Thus, from the many readings of the indictment and explanations of the charge, the jurors were told numerous times during jury selection—ranging from at least 14 times in the case of the first three jurors selected, to 3 times in the case of the last juror selected—that they could not convict Victory of felony murder unless he was committing the underlying felony of escape at the time the police officer was shot.

The Opening Statement and the Evidence at Trial

During the prosecutor's opening statement, the jury was again read the felony murder charge as stated in the indictment (486-87), this time together with an outline of the evidence which the People intended to present in support of that charge. Thus, before hearing the evidence, the jury had been informed numerous times of the importance of examining Victory's conduct prior to the shooting to determine whether he was in the process of escaping at that time.

During the People's case, four eyewitnesses to the incident were called: Francisco Garcia, a businessman from Maryland visiting New York; Mr. Garcia's wife, Donna Garcia; his niece, Theresa Gentry, and a family friend,

Maureen LaGuardia. They were leaving Arthur's when the incident began. At one point during the incident, Mr. Garcia attempted without success to assist Patrolman Varecha, and Mr. Garcia stayed near the officer as Victory and Bornholdt drew the officer into the alley where the fatal shots were fired.

These four witnesses described the actions of Victory, Bornholdt and the police officer as they arrived at Arthur's, and moved into the alley where the shooting occurred.* There was lengthy cross-examination by both Victory's and Bornholdt's attorneys. Victory's counsel, in particular, went over in great detail the witnesses' observations of Victory's conduct immediately prior to the shooting.

Summations

In summation, Victory's counsel dwelt upon this same phase of the events, repeatedly emphasizing the issue of whether this shooting occurred while the underlying felony was being committed. Paraphrasing the indictment, Victory's counsel stated,

> He's charged that while acting alone and with Robert Bornholdt, *while in the engagement of the commission of the crime of escape in the second degree*, and in the course of such crime, and in the furtherance thereof, and in the immediate flight therefrom, he caused the death of Patrolman Varecha (2716) (Italics added.)

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* A summary of the evidence introduced by the People in its case-in-chief and by Victory in his defense is contained in the Addendum hereto. Neither Victory nor Bornholdt testified at the trial.

Victory's counsel pointed out:

> This is a murder which is not dependent upon the actual act of shooting. It is depentent [sic] upon the circumstances which occurred *at the time of the shooting.*
>
> And that's what you are going to have to decide.
>
> This is not a case of two armed men going into a bank or into a luquor [sic] store to rob, in which one of the armed men would [sic] shot the owner or one of the bank attendents [sic] (2717-18). (Italics added.)

Victory's counsel also referred to the prosecutor's opening statement, saying that the People intended to prove that the officer tried to effect the arrest of Victory and Bornholdt, that "in the alley, Bornholdt and Victory continued in their efforts to get away" (2726), and that then the shooting took place.

Victory's counsel repeatedly emphasized that the events between the time of the arrest and the time of the shooting were of critical importance "in determining whether or not he is guilty of murder, whether or not he was trying to escape * * *" (2741). Referring to the time when Victory was in the alley being told by the officer to put his hands against the wall, counsel argued that Victory "was not trying to escape. He was not trying to escape" (2744). He argued that the People had not proven that there was "an intent to escape in this case" before the shooting took place (2754).

He argued that in the alley, immediately prior to the shooting, Victory was not "trying to escape" or "attempting to escape" (2769), and that the testimony of the eyewitness did not "indicate that he was attempting to escape

when this felony was committed'' (2771). He claimed that even if all of Maureen LaGuardia's testimony were credited, it did not ''indicate that Albert Victory tried to escape'' (2779).

After discussing the testimony of the eyewitness, Victory's counsel pointedly put the issue to the jury:

> What we are interested in in the testimony that I am interested in in this case and what I suggest that you should be interested in is *whether or not Albert Victory was in the act of escaping when the police officer was shot* (2783). (Italics added.)
>
> Now, although everything that happened here is important, because it indicates why the witnesses testified the way they did, it is of no consequence in determining *whether or not Albert Victory was trying to escape when the police officer was killed,* it is of absolutely no consequence.
>
> What can you say? It was horrible. You are sorry about it. It shouldn't have happened. But in terms of determining *whether or not there was an escape in the second degree committed when the police officer was shot,* forget all of this, forget it all, and pick up at the point where Albert Victory was told by the police officer, ''You are under arrest'' (2783-84). (Italics added.)

Again, Victory's counsel noted,

> the People are trying to indicate that Albert Victory was trying to escape while he was in here, while he was in here, while he was in this alley (2788).

and again:

> we've got a felony murder case dependent upon an escape here. Albert Victory is not the killer (2813).

Counsel himself told the jury that he had emphasized the issue of whether Victory intended to escape at the time Patrolman Varecha was shot:

> Throughout my talk with you this afternoon, I've [stressed*] with you the underlying crime of this felony is escape in the second degree.
>
> In particular, what was Albert Victory's *intent* after he was told, "Put your hands up, you are under arrest?"
>
> That's what you have to decide. In order to be guilty of escape, you have to *intend* to escape (2839). (Italics added.)

He asked the jury:

> are you going to come back with a verdict of murder based upon that testimony because of the *intent* of Albert Victory as you see it, based upon all this? (2939). (Italics added.)

He urged the jury to find

> a reasonable doubt in your mind as to any one of the essential elements of the crime, whether or not Albert Victory attempted to escape in what he did with Robert Bornholdt . . . (2840).

The prosecutor, in his summation, likewise focused the jury's attention on the issue of whether Victory was in the process of escaping at the time of the fatal shooting. The prosecutor noted Victory's contention that he

> was not escaping from lawful custody at the time of the fatal shooting by Bornholdt (2856).

The prosecutor then cogently put to the jury the central issue it had to decide with respect to Victory:

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* "Stretched" in original.

> was Albert Victory escaping from lawful custody when Bornholdt fired those shots into Patrolman Varecha? (2857).

Repeating the issue, he stated:

> was Albert Victory in the process of escaping from a lawful arrest by Patrolman Varecha when Robert Bornholdt fired the fatal shots? (2858).

The Charge

The trial judge submitted to the jury, with respect to both defendants, the crime of Felony Murder and also the lesser crime of Escape in the Second Degree (3087-88).* In his charge, in addition to telling the jury the elements of Escape in the Second Degree (3054-55, 3056-57, 3062-63, 3106-08, 3140-42, 3176-78), the trial judge discussed felony murder at some length, explaining on numerous occasions, as had the prosecutor and defense counsel, that, to convict of felony murder, it was necessary for the jury to find that an escape was being committed at the time Patrolman Varecha was shot. The trial judge told the jury:

> if a defendant participated in the crime of assault on a police officer and escape from his custody while his accomplice, during the course and in furtherance of the escape, shot and killed the police officer, all persons so acting would be involved in the crime of assault and escape and homicide (2969).

The judge summarized the charge as follows:

> It is the People's contention in this case that the two defendants, while committing the crime of escape in the second degree, killed Patrolman Varecha by shooting him with a pistol (2984).

* With respect to Bornholdt alone, the crime of intentional murder was submitted to the jury, as well as lesser forms of homicide.

The judge reminded the jury of the difference between the two indictments in the case:

> the first indictment charges both defendants with the killing of Patrolman Varecha during the course of an alleged escape from lawful custody. That is what is called a felony murder.
>
> The second indictment against the defendant Bornholdt alone charges him with the killing of Patrolman Varecha intentionally (3051).

The judge read the felony murder indictment:

> The defendants, in the County of New York, on or about October 7, 1968, acting alone and with each other, while engaged in the commission of the crime of escape in the second degree and in the course of such crime and in furtherance thereof and in immediate flight therefrom, the defendants caused the death of Patrolman John Varecha, not a participant in the crime, by shooting him with a pistol (3051-52).

The judge then read the felony murder statute, insofar as applicable to the case:

> A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit escape in the second degree, and in the course of and in furtherance of such crime or of immediate flight therefrom, he or another participant, if there be any, causes the death of a person other than one of the participants'' (3052).

The judge then explained felony murder to the jury:

> Now, under the provision of law that I have just read to you, you will observe that there is no requirement that the People prove or establish premeditation or deliberation in effecting the killing. Nor is there any requirement that the People show that a de-

> fendant intended to effect the death of his victim (3052).

But, he cautioned the jury,

> There must be proof, however, that the defendants *intended* to commit the underlying felony in this case, escape in the second degree (3052). (Italics added.)

Continuing, he stated:

> Furthermore, the prosecution must show that during the commission or attempted commission of the crime of escape in the second degree, and in the course of and in furtherance of that crime, or the immediate flight therefrom, a defendant caused the death of a person other than one of the participants (3052).

Explaining the prosecution's burden, the trial judge stated:

> now stated simply, this means that the prosecution must show that the *defendants intended to commit escape in the second degree, the felony underlying the commission of the alleged killing; and in the course of committing that crime,* the defendants, or either of them, acting together, caused the death of Patrolman Varecha (3052-53). (Italics added.)

The judge summed up the applicable law:

> So that in this case, if you are convinced beyond a reasonable doubt that these defendants, or either of them, committed an assault in the second degree, as I have defined that crime for you, on Police Officer Varecha, and that Police Officer Varecha had told these defendants that they were under arrest, and they refused to accede to his command, or resisted it, and sought to flee from his custody, you would be justified in finding that there was an escape in the second degree.

> *To convict a defendant of murder* under the provision of law which I read to you, *in addition* to being convinced beyond a reasonable doubt that the defendants either committed or attempted to commit escape in the second degree, you must *further be convinced beyond a reasonable doubt that in the course of, and in furtherance of such crime, or of the immediate flight therefrom—I'm talking about the crime of escape in the second degree—a defendant caused the death* of a person other than one of the participants (3056-57). (Italics added.)*

Jury Deliberations and Supplemental Instructions

The jury retired to deliberate at about 2:00 p.m. on Thursday, April 16, 1970 (3906). During the course of its deliberations on that day and the next day, the jury, in addition to requesting re-reading of the law on certain subjects,** twice requested the re-reading of portions of the testimony by two of the eyewitnesses (3111-12, 3155). Judg-

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* The main charge thus amply conveyed the substance of Victory's request to charge:

> In order for you to convict the accused, Albert Victory, of the crime of felony murder, you must find that the prosecution has proven beyond a reasonable doubt that prior to or contemporaneous with the killing, Victory formed an intent to escape from the custody of the Patrolman and attempted to so escape, and that the killing occurred in the course of and in furtherance of that attempted escape.
>
> If the accused, Albert Victory, formed an intent to escape for the first time following the shooting and then fled from the scene of the shooting, he would not be guilty of felony murder and you must find him not guilty.
>
> If you have a reasonable doubt whether, prior to the shooting, Victory intended to escape from the custody of the Patrolman, you must acquit him of felony murder, the only crime charged in this indictment (3489-3490).

** Assault (3102), escape (3102, 3135, 3142), affirmative defense (3135).

ing from its questions, the jury was focusing on the facts crucial to the determination of the legal issue concerning felony murder: was Victory in the process of escaping when the officer was shot? Both requests were directed to testimony concerning events from a specified point during the incident "through to the gunfire" (3112, 3155). When the first request was made on the evening of the first day of jury deliberations, April 16, 1970, the jury foreman informed the court that "The last sentence in that request was an attempt to *particularize the period of time that we are concerned with* (3116). (Italics added.) The jury's second request, made on the afternoon of the next day, Friday, April 17, 1970, again called for a reading of the testimony of these same two witnesses, further narrowing the time frame by referring to Victory's conduct in the alley just prior to the shooting (3155). (See Addendum, pp. 8-9.)

At 6:35 p.m. on the evening of that Friday, shortly after the testimony specified in the jury's second request was re-read, the jury initially reported that it was unable to reach a verdict (3163). However, the jury continued its deliberations and at 9:05 p.m. reported that it had found Bornholdt guilty of common law murder (3163-64). When that verdict against Bornholdt was received, the trial judge asked the jury, since "there was some progress in your deliberations," to continue its deliberations concerning Victory, and Bornholdt as well, for a while longer (3171-72).

At that point, as indicated by the trial judge's instructions, there were two crimes under consideration by the jury: (1) Felony Murder, and (2) Escape in the Second Degree. Apparently, the jury was having difficulty reaching agreement on the felony murder charge and turned to the lesser charge of Escape in the Second Degree which had also been submitted to them.

A few minutes after the jury retired to continue its deliberations, a note was received from the jury (3173) asking a question not about Felony murder but about the crime of Escape in the Second Degree:

> As a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault? (3174).

To that question about the crime of Escape in the Second Degree, the trial judge gave the following answer:

> Now, ladies and gentlemen, the question does not in law permit of a categorical yes or no answer in the form in which this is phrased, I cannot give you a legal answer categorically yes or no, but I will try and make it all very clear to you and see whether or not this does not answer the question from a legal standpoint for you.
>
> Now, first, I want to make it perfectly clear that in order that you find the crime of escape in the second degree occurred, you must be convinced beyond a reasonable doubt that a defendant was arrested for a felony, as, for example, assault in the second degree; and that the defendant, such defendant, a defendant refused to submit to the authority of the arresting officer or challenged or resisted the arrest; and that a defendant escaped from custody.
>
> You must find that, in order to find that the crime of escape in the second degree occurred, you must be convinced beyond a reasonable doubt that (1) a defendant was arrested for a felony, as, for example, assault in the second degree; (2) that a defendant refused to submit to the authority of the arresting officer or challenged or resisted the arrest; and (3) that a defendant escaped from custody.
>
> Now, there is no doubt that—I told you that—the arresting officer here is a policeman, that is, a peace

officer; he comes within that definition; and I told you what the law meant by "custody"; I explained that very clearly.

Now, flight after a shooting in and of itself does not necessarily constitute escape in the second degree. However, flight after a lawful arrest by a policeman for the felony of assault in the second degree does constitute the crime of escape in the second degree, whether that flight takes place before or after the shooting.

Is that clear?

Now, in other words, you have got to find things in this order: You must find them beyond a reasonable doubt. (1) That there was the felony of assault in the second degree; (2) that as a result of that assault in the second degree, there was a lawful arrest; and (3) that following that lawful arrest there was flight from the custody of that arrest. (3176-79)

Having answered the jury's question about the crime of Escape in the Second Degree, the trial judge proceeded to tell the jury twice that to convict the defendants of the crime of felony murder, the jury had to find that the death of Patrolman John Varecha was caused while the defendants were in the process of escaping. First, the judge reminded the jury that under the statute a person is guilty of the crime of felony murder:

> When, acting either alone or with one or more other persons, he commits or attempts to commit escape in the second degree and, in the course of and in furtherance of such crime, or of immediate flight therefrom, he or another participant, if there be any, causes the death of a person other than one of the participants. (3178)

Second, the judge again explained to the jury that the defendants were charged with the crime of felony murder:

> in that the death of Patrolman John Varecha was caused while each was engaged in the commission of the crime of escape in the second degree. (3179)*

After deliberating further for about an hour, the jury found both defendants guilty of felony murder (3182-84).

On May 26, 1970, each defendant was sentenced to twenty-five years to life imprisonment (3517, 3519-20).

The Appeal

On appeal, the Appellate Division, First Department, unanimously affirmed Victory's conviction without opinion. 38 A.D. 2d 689 (1971). The New York Court of Appeals also affirmed the conviction unanimously. 33 N.Y. 2d 75 (1973). In its decision, the Court of Appeals rejected Victory's attack on the sufficiency of the evidence:

> There was eyewitness testimony from which the jury could reasonably find that Victory kneed the officer in the groin (assault in the second degree, Penal Law, §120.05, subd. 3) and that Bornholdt joined in the assault; that Varecha drew his service revolver and told the defendants that they were under arrest (Code Crim. Pro., §177, subd. 1); that both defendants continued to resist the restraint sought to be imposed by the officer and got away (escape in the second degree, Penal Law, §205.10), and that in the course of and in furtherance of getting away, Bornholdt shot and killed the officer, a criminal act, the responsibility for which, Victory, a participant in the underlying felony, must share. (Murder, Penal Law, §125.25, subd. 3.) (33 N.Y.2d at 81-82) (footnotes omitted).

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* Even though the question asked by the jury was about the crime of Escape in the Second Degree and the trial judge after answering that question, added two reminders that the jury could not convict the defendants of felony murder unless it found that they were in the process of escaping at the time of the shooting, Victory's attorney took exception to the court's instruction on the ground that the judge "has definitely left an impression with that jury that flight after the homicidal act would be sufficient for purposes of making out a felony murder. That is not the law * * *" (3180).

The New York Court of Appeals considered Victory's claim that there was error in the portion of the trial judge's supplemental instruction concerning the crime of Escape in the Second Degree. Victory pointed particularly to these words: "flight after a lawful arrest by a policeman for the felony of assault in the second degree does constitute the crime of escape in the second degree, whether that flight takes place before or after the shooting". Even though this instruction had to do with the crime of Escape in the Second Degree, which had been submitted to the jury, Victory nonetheless contended that the instruction erroneously conveyed the impression that the jury could convict of felony murder even if it determined that Victory's intent to escape arose after the shooting. The Court of Appeals rejected that contention, stating:

> The governing principle is clear: a person may be convicted of felony murder only if it be proved that he or another participant in one of the enumerated felonies killed "in the attempted execution of the unlawful end" * * *. The Trial Justice, obviously cognizant of this principle, repeatedly, both in the main charge and in the supplemental charge, instructed the jury that the shooting must have occurred "during the course of", "in furtherance of" and "while" committing the crime of escape. In sum, the court's charge sufficiently informed the jury that if the defendant did not intend to escape at the time the killing occurred, it could not convict of felony murder. (33 N.Y. 2d at 82) (Citations omitted.)

Certiorari was denied by the United States Supreme Court. 416 U.S. 905 (1974). After *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), was decided, Victory moved in the New York Court of Appeals to reargue the constitutionality of New York's affirmative defense to felony murder (N.Y. Penal Law Sec. 125.25(3)). This motion was denied.

The Federal Habeas Corpus Proceeding

In his habeas corpus petition in the District Court, Victory presented three claims. First, he attacked the constitutionality of the New York law under which a defendant bears the burden of establishing by a preponderance of the evidence the affirmative defense to felony murder permitted by N.Y. Penal Law §125.25(3). The District Court did not pass on this claim (89a*).

Second, Victory claimed that he had been unconstitutionally limited in cross-examining a prosecution witness concerning prior statements. The District Court rejected this claim (71a-72a).

Third, Victory renewed the claim he made in the state appellate courts that the jury had been inadequately instructed that, to convict him of felony murder, it was necessary to find that he was in the process of escaping when the officer was shot. In the District Court, Victory contended that the claimed error was of constitutional magnitude. The District Court granted relief on this claim.**

In its decision, dated May 31, 1977, the District Court stated that it thought that the jury's question during deliberations about the crime of Escape in the Second Degree showed that it had not understood the trial judge's pre-

* References followed by "a" are to pages of the Joint Appendix filed on this appeal.

** The District Court reached the merits of this claim, rejecting the State's contention that state remedies had not been exhausted since, on the direct appeal, Victory's contention that the trial court's supplemental instruction was erroneous was presented solely as matter of state law without claiming that any constitutional issue was presented.

vious instructions concerning felony murder. Disagreeing with the state appellate courts, the District Court also thought that the trial judge's answer to the question about escape permitted the jury to convict Victory of felony murder even though he did not form an intent to escape until after Bornholdt had shot Patrolman Varecha. The District Court concluded that the jury instructions were so inadequate that Victory was denied due process (72a-76a, 83a-90a).*

After the District Court granted habeas relief, Victory moved in the District Court for release on bail pending the State's appeal from the grant of habeas relief. On July 20, 1977, this application was granted by the District Court (Ward, J.). On July 27, 1977, this Court (Oakes, J.) granted the State's application for a stay of the District Court's bail order.**

POINT

The simple concept on which the District Court thought the jury was inadequately instructed was, in fact, the subject of numerous instructions by the trial judge and was emphasized throughout the trial by the prosecutor and defense counsel.

Victory claimed below that he should be granted habeas corpus relief because of an error in jury instructions so severe as to deny him due process. In order to prevail on a claim of this nature, a habeas corpus petitioner bears a very heavy burden.

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* The District Court's opinion is reported at 432 F. Supp. 1240.

** The decisions of the District Court and of this Court on the bail matter are reproduced at 94a-96a and at 97a-101a, respectively.

In federal habeas corpus review, the requirements for relief are much more stringent than on direct review. The relief sought on direct review is simply another trial and, in a unitary jurisdictional framework, an appellate court may require the trial court "to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Cupp* v. *Naughten,* 414 U.S. 141, 146 (1973). In contrast, before a state conviction may be overturned in a federal habeas corpus proceeding, the jury instructions must be so fundamentally inadequate that the conviction must be vacated even when, as here, the collateral attack is made many years after the conviction when "it may be impossible, as a practical matter, to conduct a retrial." *Henderson* v. *Kibbe,* —— U.S. ——, 97 S.Ct. 1730, 52 L.Ed. 2d 203, 212 n. 13 (1977). Thus, the question in a federal habeas proceeding is not merely whether the trial judge made a mistake, or whether "the instruction is undesirable, erroneous, or even 'universally condemned' * * *." *Cupp* v. *Naughten, supra,* 414 U.S. at 146. The question is whether, considering the charge as a whole and the entire trial, "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process" (*id.* at 147). It must be established that the jury instruction "so offended established notions of due process as to deprive the respondent [defendant] of a constitutionally fair trial" (*id.* at 144). Thus, even errors of a serious nature have been held not to warrant federal habeas corpus relief. *See, e.g., Cupp* v. *Naughton, supra; Schaefer* v. *Leone,* 443 F. 2d 185 (2d Cir. 1971).

Here, the District Court accepted Victory's contention on the theory that one phrase in a single jury instruction permitted the jury to convict Victory of felony murder without finding that Victory was in the process of escaping at the time the police officer was shot. With all due respect, the District Court was simply mistaken in assuming that the jury was confused on this point, and in concluding that the jury instructions were inadequate.

In this case, from the opening moments of jury selection to the final instruction, the jury was repeatedly told that in order to convict Victory of felony murder it had to find that Victory was committing the underlying felony of escape at the time Patrolman Varecha was shot. This simple legal concept was stated in the indictment, which, during jury selection, was read numerous times and was repeatedly discussed by Victory's counsel. He made it abundantly clear that the jury would have to decide whether the officer was shot "during the course of" (VD 542-543, 590-591), "during the period of" (VD 845-846), "during the commission of" (VD 988-990, 1064-65), "while in the commission of" (VD 1946) the underlying felony of Escape in the Second Degree. Victory's counsel used other phrases as well which emphasized the need to determine when, in relation to the shooting, the crime of escape was committed: an Escape in the Second Degree "followed by" "or simultaneous with" the shooting (VD 542-543); "during the course of this escape" (VD 988-990); "as a result of this alleged attempt to escape" (VD 988-990); "an attempted escape during which time" Bornholdt allegedly shot the officer (VD 1521). Towards the end of the voir dire, with 11 jurors chosen, Victory's counsel again plainly stated the charge: "The People claim that there was an assault, followed by

an escape, during which time it is alleged that the defendant Bornholdt shot and killed the police officer * * * and the culpability of the defendant Victory rests upon his allegedly having participated in the underlying felony of escape while this shooting took place. And this, is something that the People must establish beyond a reasonable doubt'' (VD 1521). Again, with all 12 jurors chosen, Victory's counsel repeated that the People must prove ''beyond a reasonable doubt that my client was in the act of escaping at the time that the police officer was killed'' (VD 1946-1947).

After these numerous explanations of the felony murder charge, the indictment was again read to the jury during the prosecutor's opening statement. Thus, as the jury heard the extensive testimony from the four eyewitnesses concerning the events leading up to the shooting, with lengthy cross-examination concerning the details of Victory's movements and actions, the jury had been fully informed of the importance of examining Victory's conduct before and at the time of the shooting to determine whether Victory was guilty of felony murder.

The summations by Victory's counsel and by the prosecutor concentrated on this point. As he had so many times during the selection of the jury, Victory's counsel repeatedly stated the issue to be ''whether or not Albert Victory was in the act of escaping'' or ''was trying to escape,'' whether or not there was an escape in the second degree committed, ''when the police officer was shot'' (2783-84). Victory's counsel directed the jury's attention over and over again to the events immediately preceding the shooting, arguing that the People had not proven that his client was trying to escape, or had any intent to escape, at the

time the officer was shot. Similarly, the prosecutor, in his summation, framed the issue to be whether Victory was "escaping from lawful custody" (2857), whether he was "in the process of escaping from a lawful arrest" (2858), when Bornholdt fired the fatal shots.

Then, the trial judge thoroughly instructed the jury on this issue, covering the point a total of eight times. He read from the felony murder statute twice.* But, he did not merely charge the "bare language of the statute" as the District Court's opinion states (73a). Like Victory's counsel and the prosecutor, the trial judge used a variety of phrases to explain that to convict of felony murder the jury had to find that the defendants were committing the underlying felony of escape at the time the police officer was shot. The trial judge told the jury that the shooting must have occurred "while" the defendants were "committing the crime of escape in the second degree" (2984), "during the course of an alleged escape" (3051), "during the course of and in furtherance of the escape" (2969). The last words which the jury heard before finding Victory guilty of felony murder were the trial judge's explanation, in a few simple words, that the defendants were charged with the crime of felony murder "in that the death of Patrolman John Varecha was caused while each was engaged in the commission of the crime of escape in the second degree" (3179).

Not only was the jury thoroughly instructed by the trial judge, and repeatedly told by prosecutor and defense counsel, that it could not convict Victory of felony murder unless

* The judge read the statute only insofar as applicable to this case, omitting the other predicate felonies besides Escape in the Second Degree.

it found that he was escaping at the time the shooting occurred, but—unlike the ordinary case where there is no indication from the jury whether its verdict was based on a proper understanding of the law—in this case there were strong indications from the jury during its deliberations that it actually was grappling with the crucial point. The jury itself demonstrated its understanding of the felony murder charge by two requests for re-reading of specific portions of testimony by two eyewitnesses. The portions that the jury wanted re-read were described by reference to events immediately preceding the shooting. The jury foreman noted that the first request "was an attempt to particularize the period of time that we are concerned with" (3116). The jury's second request focused even more sharply on the portions of the testimony of these same two witnesses which described Victory's conduct during the critical moments just prior to the shooting (3155).

Despite the numerous instructions by the trial judge, the many statements by counsel, and the indications that the jury actually understood the issue, the District Court ruled that the jury instructions were so inadequate that habeas corpus relief was warranted. The District Court's conclusion was based on one question by the jury during deliberations and the trial judge's answer thereto. The District Court simply assumed that the jury's question was about the crime of felony murder (see 84a). Reading the question based on that assumption, the District Court concluded that the jury was confused about whether it could convict Victory of felony murder even if he did not begin to escape until after the police officer was shot. Then, based on the same assumption, the District Court concluded that the trial judge's answer did not adequately clarify the point.

The District Court's assumption is simply mistaken. The jury's question was not about felony murder but was about the crime of Escape in the Second Degree, and reflected no confusion about the crime of felony murder. On Friday evening, April 17, 1970, after two days of deliberations, the jury was initially unable to agree upon a verdict, despite the second re-reading of testimony about the events just prior to the shooting—events which were critical to the felony murder charge. The jury then turned its attention to the intentional murder charge against Bornholdt, and, later that evening, reached a verdict of guilty on that charge. Returning to deliberate further, the jury almost immediately sent back a note asking about Escape in the Second Degree, the other crime besides felony murder which remained for the jury's consideration at that point:

> As a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault? (3174).

By its terms, this was a question about the crime of "Escape in the Second Degree." Apparently, in an effort to reach a verdict as the trial judge had suggested, the jury had taken up the lesser crime of escape in the second degree instead of returning immediately to discussion of the then unresolved matter, pertinent to the felony murder charge, of whether the defendants were in the process of escaping prior to the shooting.

The trial judge's answer was also about the crime of Escape in the Second Degree. Answering the jury's question, the judge properly differentiated between flight after a shooting, which "does not necessarily constitute escape," and flight after a lawful arrest for a felony, which, by

definition, does constitute the crime of an Escape in the Second Degree," regardless, as the judge stated, of "whether that flight takes place before or after the shooting" (3177-78).

Then, after answering the jury's question about the escape charge, the judge twice re-instructed the jury that a conviction for felony murder required consideration of when the alleged escape began. First, the judge read the portion of the statute applicable to the case, which clearly set forth that requirement. Then, he added the short, plain explanation that the defendants were charged with felony murder "in that the death of the Patrolman John Varecha was caused while each was engaged in the commission of the crime of escape in the second degree" (3179).* These were the last words which the jury heard before it retired for its final deliberations and reached a verdict of guilty on the felony murder charge.

Thus, the District Court's unsupported assumption that the question was about felony murder was contrary to the terms of the question itself, contrary to the immediate context in which it was asked, and indeed, contrary to the entire record of the trial. The jury had been told over and over again, by the trial judge, prosecutor and defense counsel—altogether more than a dozen times—that to convict of felony murder, it had to find that the killing was committed while the underlying felony was in progress. On this record, it would require very strong evidence, and should by no

* The District Court's decision did not mention this last explanation but noted only the judge's reading from the statute (see 75a, 86a).

means be assumed, that the jury did not understand the point.

In sum, the trial judge, prosecutor and defense counsel made the point numerous times, the jury indicated that it actually grasped the point and was attempting to resolve the issue, and then after two final reminders, the jury, by its verdict, resolved the issue against Victory and Bornholdt. The record does not support the conclusion that the jury was confused or that the instructions were inadequate. The New York Court of Appeals rejected Victory's contention under state law on direct review. There is no basis for concluding that Victory has met the much more stringent standard applicable when jury instructions are challenged on constitutional grounds in a federal habeas corpus proceeding.

Conclusion

The order of the District Court should be reversed and the petition for a writ of habeas corpus should be dismissed.

Respectfully submitted,

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ADDENDUM

Statutes

N.Y. Penal Law §125.25 provides:

"A person is guilty of murder in the second degree[*] when:

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

* [Re-titled "in the second degree" in 1974.]

N.Y. Penal Law §205.10 provides:

"A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a felony, he escapes from custody."

N.Y. Penal Law §120.05 provides:

"A person is guilty of assault in the second degree when:

. . .

3. With intent to prevent a peace officer * * * from performing a lawful duty, he causes physical injury to such peace officer * * *."

N.Y. Penal Law §10.00(9) provides:

" 'Physical injury' means impairment of physical condition or substantial pain."

THE EVIDENCE AT TRIAL

The People's Case

A Cadillac speeds through a red light and a uniformed police officer on foot patrol commandeers a taxicab and gives chase.

Shortly after one a.m. on the rainy Sunday night of October 6-7, 1968, **Frank Ostrowski**, a taxicab driver, was stopped for a red light at the corner of 54th Street and Fifth Avenue, heading east, when he saw a Cadillac, with two men inside, speed through the red light traveling east (Ostrowski: 680-4, 687, 695). A 25-year-old patrolman, John Varecha, in uniform and raincoat at his post on 54th Street (Aragona, 646-50; Gross, 1854), ran to the cab, banged on the door, was let in and commanded the driver to "chase that Cadillac" (Ostrowski: 684). The Cadillac traveling at about 50 miles an hour (688), drove through a second red light at Madison Avenue and 54th Street, crossed Park Avenue as the red light changed, crossed Lexington Avenue and stopped midway down the block in front of "Arthur's", a discotheque (Ostrowski: 685-93). The patrolman directed the cab driver to pull up behind the Cadillac; after the officer got out Ostrowski drove away (Ostrowski, 693-7).

The patrolman attemps to speak to the occupants of the car, Albert Victory and Robert Bornholdt, and is rebuffed.

That evening, **Francisco Garcia** and his wife, **Donna Garcia**, **Theresa Gentry**, their niece, and **Maureen LaGuardia**, a close friend, visited Arthur's Discotheque, located on the south side of 54th Street between Lexington and Third

Avenues in Manhattan. They left at about one a.m. As they stood under the canopy to avoid the heavy rain, a car pulled up in front of Arthur's; two men got out (F. Garcia, 1031), Albert Victory from the driver's side (F. Garcia, 1032) and Robert Bornholdt from the front passenger's seat (F. Garcia, 1033).*

Laughing to each other, Victory and Bornholdt ran under the canopy and toward the steps of Arthur's (F. Garcia, 1031; D. Garcia, 1329; LaGuardia, 835; Gentry, 1643-4). Just then, a taxicab made a "fast stop" in front of the discotheque and a police officer jumped out, saying in a loud voice to Victory and Bornholdt, "Hey you, one minute, let me see your registration and license. You just went through some lights" (F. Garcia, 1034; LaGuardia, 842; D. Garcia, 1330; Gentry, 1464). Approaching them, the police officer asked who was driving the car. Victory, while "spinning" the car keys in his hand (F. Garcia, 1032; D. Garcia, 1331; Gentry, 1464), replied, "What car? We wasn't driving no car. What are you talking about?" (F. Garcia, 1035); "I don't drive"* (LaGuardia, 842; Gentry, 1464). In a quiet voice, the officer asked Victory, "Okay. How did you get here then?" Victory answered, "By truck" (LaGuardia, 843; Gentry, 1465).

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* A matchbook taken from the glove compartment of this automobile was introduced in evidence at trial (735; Peo. Exh. 18), and a detective from the latent fingerprint unit testified that a fingerprint found on the matchbook cover was compared with Albert Victory's fingerprints and found to be the same (Meyer, 739).

* Victory's New York State driver's license had been revoked more than three years earlier, on April 16, 1965 (Mazza, 1844).

Victory grabs the officer.

Victory and Bornholdt then started up the steps of Arthur's, but the officer extended his nightstick to block their entrance (F. Garcia, 1035). When they ignored his direction to stop (LaGuardia, 830; Gentry, 1467), the patrolman grabbed Victory's arm, demanding, "I want an answer. Who was driving the car, and I want to see the license and registration" (Gentry, 1468; LaGuardia, 830, 925). As Bornholdt "clenched his fists" (Gentry, 1469, 1514-15) and approached the officer from the rear (F. Garcia, 1038), Victory grabbed the policeman by the lapels of his raincoat, "sort of" lifted him up, and stated, "Don't you touch me." "Don't you ever do that again" (F. Garcia, 1039, 1107; D. Garcia, 1334; LaGuardia, 843, 929-30; Gentry, 1468, 1470-1).

Maureen LaGuardia left the canopy and ran to get her car, parked on Third Avenue. Victory and the officer grappled with each other as they moved away from Arthur's, Bornholdt "always" positioning himself to the rear of the officer (F. Garcia, 1040-2, 1101; D. Garcia, 1336-7; Gentry, 1472). Garcia left his shelter under the canopy to witness the altercation. Bornholdt now turned to him and said, "Mind your own business. Get the fuck out of here" (F. Garcia, 1042).

The officer tells Victory he is under arrest, Victory knees the officer in the groin and Bornholdt jumps the officer from behind.

The patrolman then told Victory that he was under arrest (F. Garcia, 1047, 1049). At this point, Victory looked at Bornholdt and then grabbed the patrolman by his

lapels near the neck and kneed him in the groin "very hard," "practically lifting him off the street" (F. Garcia, 1042-5, 1122). Garcia's wife saw Victory "bring his knee up and just kick the policeman in the groin . . . The policeman crouched over. He was hurt" (D. Garcia, 1338-9, 1369). Theresa Gentry testified that Victory, from the front, and Bornholdt, from the rear, were fighting with the officer when she noticed the policeman "all hunched over, doubled over with one hand right across his stomach" (Gentry, 1473).

As the officer stood hunched over from the kick, Bornholdt jumped on his back and both he and Victory began to punch the officer with their fists (F. Garcia, 1045-6; D. Garcia, 1341, 1370, 1402; Gentry, 1472-3). While Garcia made an effort to pull Bornholdt off, the officer pushed Victory away and, with his nightstick "going back and forth," struck Bornholdt and Victory over their heads with his club, drawing blood (F. Garcia, 1046-9, 1127, 1130; D. Garcia, 1341-3; Gentry, 1472-3). The patrolman doubled up and moaning, and holding himself between the legs with his left hand, now drew his revolver with some difficulty and told his assailants that they were under arrest (F. Garcia, 1047). While Theresa Gentry ran into Arthur's (Gentry, 1476), Maureen LaGuardia, who by this time had driven back to Arthur's, saw the police officer bent over near a parked car, "his face contorted in pain," while Bornholdt, crouched down with his arms spread wide, was "slowly creeping" around the car behind the officer (LaGuardia, 850-3, 969).

Victory draws the patrolman into a nearby alley as Bornholdt circles behind the officer.

As Bornholdt was edging behind the officer (F. Garcia, 1050, 1134; D. Garcia, 1343; LaGuardia, 852-3), Victory slowly backed up in a westerly direction towards Lexington Avenue, his arms outstretched below his shoulders and moving in a circular motion, saying repeatedly as he backed up, "Listen, I want to help you. I don't want any trouble. Come on" (LaGuardia, 855-6, 976). Victory and the officer kept moving farther down the block (F. Garcia, 1050-1; D. Garcia, 1343; LaGuardia, 855-6, 859). The officer, "bent down in pain" (LaGuardia, 856), was trying to follow Victory, telling him to stop and get against a car (LaGuardia, 859). Victory kept talking and backing off, "drawing the officer back" (LaGuardia, 857, 859), until they arrived alongside an alley in which Bornholdt had already entered, followed by Garcia (F. Garcia, 1051; LaGuardia, 859-60).

Continuously moving around him, Victory and Bornholdt draw the policeman into the alley.

Trying to hold himself upright, the patrolman again told Victory and Bornholdt that they were under arrest, and ordered them to get against a wall at the mouth of the alley (F. Garcia, 1051; D. Garcia, 1344). Victory moved over to the easterly wall of the alley "momentarily" (F. Garcia, 1052), and as the policeman directed his attention to Bornholdt, Victory sidestepped" farther into the alley, "continuously moving" about (F. Garcia, 1243, 1246-8, 1315; D. Garcia, 1344, 1435), and repeating, "Give me a break" (F. Garcia, 1052). Bornholdt was "continuously moving" to the officer's back or to his side opposite from where Victory was moving (F. Garcia, 1053, 1248-9; D. Garcia, 1345).

Maureen LaGuardia testified that she heard the officer order Victory out of the alley, to no avail, then entered it himself, at which time she lost sight of the participants (LaGuardia, 859-60). Moments later, she saw the policeman withdraw from the alley, his head bobbing up and down, his body doubled over as he waved his gun back and forth in the general direction of Victory and Bornholdt, who were emerging slowly from opposite sides of the alley, their arms spread wide (LaGuardia, 862-7). Victory approached the officer and, close to the west wall of the alley, the officer turned Victory around and "got his hands up." Meanwhile Bornholdt, in a semi-crouched position, had circled onto the sidewalk and approached the officer from the rear (LaGuardia, 869-70). After looking over his shoulder, Victory "swung around" and started "fighting" with the officer, while Bornholdt "jumped" the officer from behind, and "got the officer into the alleyway" (LaGuardia, 872-3, 991-3).

Victory and Bornholdt grapple with the officer and Bornholdt shoots and kills him.

Francisco Garcia testified that Victory was farthest into the alley facing the officer, Bornholdt was behind the officer, and Garcia stood near Bornholdt, when Garcia testified, Victory stated, "Get the cop. Get the cop" (1053, 1189-90, 1194-5) or "Get a cop. This guy is crazy" (1242, 1280-1). Garcia went to the officer, saying "I'm with the cop" (1053). Again ordered against the wall, Victory moved over to the wall, stood there "momentarily," and "came off" the wall, telling Garcia to "Get the fuck out of here; mind your own business" (1058, 1312), while Bornholdt

moved behind the officer and started to "grab something" in his jacket, also ordering Garcia to "Get the hell out of here" (1058, 1249).

Garcia retreated from the alley, yelling to his wife to get help (1058). Garcia heard a shot coming from inside the alley (1059); it sounded like a "soft shot," according to Maureen LaGuardia (LaGuardia, 874). There was another shot, and then, as Garcia turned back, he saw Victory and Bornholdt "scuffling" with the patrolman, Bornholdt "crouching over" the officer with his hand extended, and flashing bursts which sounded "like machine gun fire" coming from the silhouetted gun in Bornholdt's hand (F. Garcia, 1059-61, 1157; D. Garcia, 1346; LaGuardia, 874; Gentry, 1477).

Bornholdt and Victory flee but are apprehended following a chase.

Detective **Randolph Jurgenson**, his sister, and Patrolman **Patrick Corcoran**, engaged to Jurgenson's sister, happened to be in Arthur's that night. Patrolman **James Pooser** of the Housing Authority Police, and a date were there as well. Hearing shouting outside ["They're beating him up" (Corcoran, 1599): "Stop that. He's a police officer. You are killing him" (Jurgenson, 1524)], these off-duty policemen ran out, just as a "rapidfire" volley of shots erupted from the alley (Jurgenson, 1525; Corcoran, 1599-1600; Pooser, 1655-6).

Bornholt ran out of the alley and towards Lexington Avenue, followed "seconds" later by Victory (Jurgenson, 1577), who at first emerged slowly, his back to the westerly

wall and his arm extended, his hands "feeling" the wall, until he arrived at the mouth of the alley when he turned and started running diagonally towards the northwest corner of Lexington Avenue (Judgenson, 1526-7, 1584-5; Corcoran, 1602; Pooser, 1657; F. Garcia, 1060; D. Garcia, 1347, 1399, 1438).

Moments later, John Varecha staggered out of the alley and collapsed, uttering "I'm hurt; I'm hurt; momma, I'm hurt" (F. Garcia, 1062; Jurgenson, 1527).

While Pooser ran after Bornholdt, who had turned the corner of Lexington Avenue and headed south, Jurgenson and Corcoran pursued Victory. Corcoran yelled to Victory, "Stop! Police!" and when Victory kept running, Corcoran fired two warning shots in the air (Jurgenson, 1527; Corcoran, 1603-4; F. Garcia, 1062). At the sound of each shot, Victory crouched down lower and kept running along the sidewalk (Jurgenson, 1528-9). Jurgenson caught Victory on the corner of Lexington Avenue and 54th Street, they "went down" and "struggled" into the gutter. Victory got up and ran north on Lexington Avenue. Jurgenson caught him again and subdued him by striking him on the head with his gun (Jurgenson, 1528-9, 1587-8; Corcoran, 1605-6, 1633).

Meanwhile, Pooser chased Bornholdt south on Lexington Avenue to 53rd Street, east to Third Avenue, and caught him between 50th and 51st Streets. Told to "freeze," Bornholdt put his hands up, was frisked and a .32 caliber automatic pistol was removed from his belt (1657-63; Peo. Exh. 40).

Brought back to the alley, Victory pleads his innocence.

Victory was taken back to the alley, struggling all the way, and screaming, "I didn't do it. Leave me alone. I didn't do anything" (Jurgenson, 1530, 1532).

Garcia, confronting Victory in the alley, accused him to the police of complicity in the shooting (Garcia, 1064). Victory responded, "My friend, how can you say that? How can you lie to all these people about me? I am with my wife. Let me go. I shall prove it. Let me go into Arthur's and I will get her. She will tell you (LaGuardia, 879; Gentry, 1483), and, to Garcia, "Didn't I tell you to call the cops?" (D. Garcia, 1350; Gentry, 1485), to which Garcia responded, "You liar. You did not" (Gentry, 1485).

Medical and Ballistic Evidence

Patrolman John Varecha was placed in a patrol car and rushed to Bellevue Hospital. He died on the way (Kagel, 1706-8). The autopsy disclosed four bullet wounds in his chest, arm and both legs (Gross, 1856, 1876). The examiner also found a small deposit of black powder on the left palm of the deceased, which, in the doctor's opinion, came from a pistol that had been fired (Gross, 1858).

A bullet recovered from the body of the deceased (Peo. Exh. 60) was examined by a ballistic expert and found to have been fired from People's Exhibit 40, the gun taken from Bornholdt (Erickson, 1927). Eight spent shells discovered in the alley were also found to have come from Bornholdt's gun (Erickson, 1917-18), the maximum load his gun could hold (Gorman, 1789).

An examination of the deceased officer's gunbelt revealed a spent bullet embedded in the front part of the belt (Corrigan, 1737, 1740). This bullet was also determined to have come from Bornholdt's gun (Erickson, 1948).

The medical examiner found no visible sign of injury in the genital region of the deceased, but stated that such injury would not necessarily be discernible from a blow to that region, due to the presence of so many nerve fibers and the tenderness of the area (Gross, 1867-70).

Albert Victory's Defense

Edward Loeffler, employed at the time of the homicide as an assistant manager at Arthur's, testified that while standing outside smoking a cigarette, he saw a police officer talking to two people to the west of the canopy, about fifty feet away (2446-9, 2469). It appeared to be a "normal conversation," although the witness heard none of it (2448-9). After finishing his cigarette he walked back inside (2469). About a minute later, he heard gunshots (2450). Loeffler recalled that the alley was not lighted (2453).

Salvatore Portanova, who managed a garage on 53rd Street which included the alley where the shooting occurred, testified that the garage was not open on Sunday, that the lights in the alley would ordinarily be turned off when the garage closed at 2 a.m. on Saturday night, but that sometimes "the men forget to put the lights out" (2521-4).

Albert Victory did not testify.

Service of 2 copies of the
within Brief is hereby
admitted this 31st day of
August 19 77
Signed William Hellerstein for The Legal Aid Society
Attorney for Petitioner-Appellee

by H.J. Steinglass, ADA
as authorized by
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